SUPREME COURT, U. S.
APR 27 1972

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1392

COUNTY BOARD OF EDUCATION OF FAYETTE COUNTY, TENNESSEE,
Petitioner,

v.

MRS. MABLE C. WALKER, MRS. ARISSIE HARDY OWENS, MRS. ROSA J. NEWBERN, MRS. DIXIE JORDAN PYE, MRS. NANNIE MAE COLE, MYLES WILSON, LOWDEN E. ANDERSON, JR., CORNELIUS W. DOUGLAS, JR., SAMMY GORDON, EARNEST HUGHES, MRS. OPAL L. FRANKLIN, MRS. WILLIE B. JOHNSON and MRS. MARY E. McKELVEY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

JAMES W. McDONNELL, JR.
1213 Union Planters Bank Building
Memphis, Tennessee 38103

G. WYNN SMITH, JR.,
1213 Union Planters Bank Building
Memphis, Tennessee 38103
Counsel for Petitioner

St. Louis Law Printing Co., Inc., 411-15 N. Eighth St. 63101 314-231-4477

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PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals
For the Sixth Circuit

The petitioner, County Board of Education of Fayette County, Tennessee, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 28, 1972.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported and appears in the Appendix. The opinion of the District Court for the Western District of Tennessee, Western Division, is not reported, and is printed in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on January 28, 1972, and on March 14, 1972 that Court granted a Stay of Mandate in accordance with Fed.R. App.P.41(b). This Petition for Certiorari was filed within 90 days of the aforesaid entry of judgment, within the time prescribed by 28 U.S.C., § 2101 (c) (1949). This Court's jurisdiction is invoked under 28 U.S.C., § 1254(1).

QUESTIONS PRESENTED

1. Whether the Fourteenth Amendment prohibits a County School Board from considering competence and teaching ability in determining which teachers to retain for an ensuing academic year when a reduction of faculty is required because of decreased enrollment following court ordered desegregation.

2. Whether non-tenured teachers have a protectible interest in continued employment such that the Fourteenth Amendment requires written notification of reasons for not renewing their contracts and an opportunity for an administrative hearing to challenge such reasons.

3. Whether the Seventh Amendment grants a County School Board the right to a jury trial in a case brought by teachers seeking reinstatement and money damages.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Seventh Amendment:

> "In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of common law."

United States Constitution, Fourteenth Amendment:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C., § 1983 (1948)

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

STATEMENT OF THE CASE

Petitioner is a Board established by Tennessee law to operate the Public School System of Fayette County, Tennessee.

Respondents[1] are 13 black teachers who intervened as plaintiffs in a school desegregation suit, originally filed in 1965.

Respondents seek reinstatement and damages for the allegedly unconstitutional failure of the Board to renew their contracts for the school year commencing in September, 1970. Federal jurisdiction was founded upon 42 U.S.C., § 1983.

Each respondent had a one year teaching contract which expired in June, 1970. None had acquired tenure pursuant to Tennessee law.

During the spring of 1970, the Board concluded that contracts of approximately 25 teachers could not be renewed for the coming year following court-ordered desegregation of the school system.

In determining which non-tenured teachers would not be offered new employment contracts, the Board considered the following factors:

1) Competency and general ability to teach and maintain discipline.

---

[1] Mrs. Mable C. Walker, Mrs. Arissie Hardy Owens, Mrs. Rosa J. Newbern, Mrs. Dixie Jordan Pye, Mrs. Nannie Mae Cole, Myles Wilson, Lowden E. Anderson, Jr., Cornelius W. Douglas, Jr., Sammy Gordon, Earnest Hughes, Mrs. Opal L. Franklin, Mrs. Willie B. Johnson and Mrs. Mary E. McKelvey. Mrs. McKelvey was dismissed as a party during the pendency of the action in the District Court and Mrs. Alberta Rivers was substituted in her place.

2) Professional standing and general reputation in the community with regard to morality and character.

3) Administrative recommendations and evaluations from principals and supervisors.

4) Available teaching positions for teachers certified in particular subjects or fields.

No consideration of race or sex was entertained except insofar as was necessary to maintain the court-ordered faculty ratio of 60% black teachers to 40% white teachers.

On the basis of the foregoing considerations, the Board determined that 7 white teachers and 15 black teachers (including the 13 respondents) would not be offered contracts for the coming year All 22 persons were notified by mail that they had not been re-elected for employment.

Respondents thereafter intervened in this cause, claiming that they had been denied due process and equal protection of the laws, and sought specifically:

1) Reinstatement as teachers.

2) Money damages.

Petitioner demanded a jury trial on the legal issues of the case, which the District Judge denied, and the cause proceeded to trial without the intervention of a jury.

During the presentation of petitioner's case the Court declined to hear any evidence pertaining to the competency, professional standing or administrative evaluations of respondents, and declined further to permit petitioner to make an offer of proof in conformity with Fed.R.Civ. P.43(c).

Following the presentation of evidence and argument of counsel, the District Court ordered petitioner to reinstate respondents with full back pay.

In the memorandum opinion filed in this cause, the District Court ruled, as a matter of law,

1) That petitioner should not have taken into consideration the competency or teaching ability of respondents, because such matters did not constitute "objective standards" within the meaning of **Rolfe v. County Board of Educ.**, 391 F.2d 77 (6th Cir. 1968).

2) That respondents, although without tenure under Tennessee law, nonetheless had a protectible interest in continued employment such that the Fourteenth Amendment required written notification to them of the reasons their contracts were not renewed and an opportunity for an administrative hearing to challenge such reasons.

3) That in the event further faculty reduction became necessary because of decreasing enrollment following court ordered desegregation, the sole standards which could be applied by petitioner in determining which teachers to retain were: (Appendix p. A-3.)

   (a) State certification.

   (b) Hours of college work and degrees held.

   (c) Appropriate credits for length of experience.

On appeal by petitioner, two Judges of the Sixth Circuit Court of Appeals affirmed the judgment of the District Court, Circuit Judge Weick dissenting.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Is in Conflict With Other Circuit Courts of Appeal as to Whether Non-Tenured Teachers Have a Protectible Interest in Continued Employment Under the Fourteenth Amendment.

Two of the three Judges of the Sixth Circuit Court of Appeals who heard this matter affirmed the holding of the District Judge that a non-tenured teacher with long periods of service in a School System acquires a protectible interest in continued employment, so that non-retention must meet minimal standards of procedural due process. Circuit Judge Weick dissented:

> " 'I . . . disagree with the holding of the District Court that a sub-non-tenure teacher who has long periods of service acquires a protectible interest in his continued employment, and his non-re-election must need meet minimal standards of procedural due process.'
>
> The Court relied on **Lucas v. Chapman**, 430 F.2d 945 (5th Cir. 1970), and **Gouge v. Joint School Dist. No. 1**, 310 F.Supp. 984 (W.D. Wis. 1970).
>
> In my opinion these decisions are contrary to the weight of authority. It is well settled that no person has a Constitutional right to public employment. **Orr v. Trinter**, 444 F.2d 128 (6th Cir. 1971). Such employment is not protected under the due process clause of the Fourteenth Amendment. **Freeman v. Gould Special School Dist.**, 405 F. 2d 1153 (8th Cir.), **cert. den.** 396 U.S. 843 (1969). See also, **Jones v. Hopper**, 410 F. 2d 1323 (10th Cir. 1969), **cert. den.** 397 U.S. 991 (1970); **Charland v. Norge Div., Borg-Warner Corp.**, 407 F.2d 1062 (6th Cir.), **cert. den.**, 395 U.S. 927 (1969); **Parker v. Board of Educ.**, 348 F. 2d 464

(4th Cir. 1965), **cert. den.**, 382 U.S. 1030 (1966).' '' (Appendix, p. A-13.)

In both the **Freeman** case and the **Jones** case, cited by Judge Weick, the non-renewal of a probationary instructor's contract, without a statement of reasons and without a hearing, was held to pass the scrutiny of the due process clause, and in each case this Court denied certiorari. The majority opinion of the Court below, places the Sixth Circuit squarely in conflict with the Eighth and Tenth Circuits.

The recurring significance of this question is amply illustrated by the number of other times petitions for certiorari have presented it to this Court during the past few months: *E.g.*, No. 70-354, **Fooden v. Board of Governors**, filed June 29, 1971; No. 71-249, **Orr v. Trinter**, filed August 18, 1971; No. 71-819, **Thomas v. Shirck**, filed December 22, 1971; No. 71-946, **Shirck v. Thomas**, filed January 21, 1972. No action yet has been taken on these petitions. The necessity for resolving this important conflict of Constitutional interpretation expressly has been recognized by this Court in two recent cases where certiorari has been granted on this identical issue. No. 70-36, **Perry v. Sindermann, cert. granted**, June 14, 1971; No. 71-162, **State College Board of Regents v. Roth, cert. granted.** Both were argued on January 18, 1972.

II

The Court of Appeals Has Decided an Important Question of Federal Constitutional Law Concerning the Standards to Be Applied in Making Faculty Reductions in the Face of Court Ordered Desegregation, Which Has Not Been, But Which Should Be, Settled by This Court.

Still at issue here is the definition of constitutionally required standards which must be applied in carrying out faculty reductions following court ordered desegregation.

Prior to the decision below, the Sixth Circuit had ruled that such standards must be "objective". **Rolfe v. County Bd. of Educ.**, 391 F. 2d 77 (6th Cir. 1968). In applying the **Rolfe** holding to the facts of the present case, the District Court held that "objective standards" were limited to

1) State certification.

2) Hours of college work and degrees held.

3) Appropriate credits for length of experience.

In affirming the judgment, the Sixth Circuit Court of Appeals held that other considerations, though non-racial in character, such as competency, knowledge of subject matter, teaching and disciplinary ability, and reputation among superiors and in the community at large, could not even be considered.

Judge Weick, in his dissent, stated:

> "In my opinion, the District Court erred in excluding evidence relating to the competency of the teachers not rehired. The Board of Education, in utilizing tax funds entrusted to it, had a duty to hire, or rehire only competent persons to teach in the Public School System. **Rolfe** may not be used to justify an order requiring the hiring of a teacher who may not be competent to teach. . . .
>
> "In its Decree, the Court ordered that in determining which teachers should be rehired in the event of further faculty or staff reduction, the sole standards to be applied should be:
>
> 1) State certification.
>
> 2) College work; and
>
> 3) Appropriate credits for length of experience.
>
> "In my opinion, this was an unwarranted interference with the functions of the County Board and was error. A teacher could have all of these attributes

and still be a person unfit for hiring as a teacher" (Appendix P. A-11).

The uncertainty that exists in the case at bar amply illustrates the paramount need for definitive standards which School Boards may follow in the future in making necessary faculty reductions. So long as such uncertainty exists, the District Courts will be called upon, in the words of Judge Weick, to

> ". . . sit as a super-board of education to supervise the daily operation of the public schools and determine all controversies which may arise in connection with the hiring of teachers" (Appendix, p. A-16).

III

The Court of Appeals Has Decided an Important Question Concerning the Constitutional Guaranty of Jury Trial in a Way That Is in Conflict With the Applicable Decisions of This Court.

Respondents sued for reinstatement and money damages. Petitioner demanded a jury trial on the legal issues, which was denied by the District Court. The majority opinion below held:

> "It seems obvious to us that the principal issues in this case are equitable and that the back-pay issue is truly 'an incident to equitable relief'. **NLRB v. Jones & Laughlin,** 301 U.S. 1 (1937)" (Appendix, p. A-9).

In **Dairy Queen, Inc. v. Wood,** 369 U.S. 469 (1962), this Court directed the Court of Appeals to issue a writ of mandamus ordering a jury trial in a trademark infringement suit seeking injunctive relief and an accounting for money damages, and stated:

> "At the outset, we may dispose of one of the grounds upon which the trial court acted in striking

the demand for trial by jury—that based upon the view that the right to trial by jury may be lost as to legal issues where those issues are characterized as 'incidental' to equitable issues—for our previous decisions make it plain that no such rule may be applied in the federal courts." 369 U.S. at 470.

Petitioner respectfully contends that the decision of the Sixth Circuit in the case at bar, is squarely contrary to the holding of this Court in the **Dairy Queen** case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted

JAMES W. McDONNELL, JR.
1213 Union Planters Bank Building
Memphis, Tennessee 38103

G. WYNN SMITH, JR.
1213 Union Planters Bank Building
Memphis, Tennessee 38103
Counsel for Petitioner

APPENDIX

APPENDIX A

No. 71-1206

United States Court of Appeals
For the Sixth Circuit

John McFerren, Jr., et al.,
Plaintiffs,

and

United States of America,
Plaintiff-Intervenor,

and

Mrs. Mable C. Walker, Mrs. Arissie Hardy Owens, Mrs. Rosa J. Newbern, Mrs. Dixie Jordan Pye, Mrs. Nannie Mae Cole, Myles Wilson, Lowden E. Anderson, Jr., Cornelius W. Douglas, Jr., Sammy Gordon, Earnest Hughes, Mrs. Opal L. Franklin, Mrs. Willie B. Johnson and Mrs. Mary E. McKelvey,
Intervening Plaintiffs-Appellees,

v.

County Board of Education of Fayette County, Tennessee, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the Western District of Tennessee, Western Division.

Decided and Filed January 28, 1972.

Before: Weick, Edwards and Celebrezze, Circuit Judges.

Edwards, Circuit Judge. Appellant school board appeals from an order entered in the United States District Court for the Western District of Tennessee, Western Division, requiring it to rehire 13 discharged school teachers with back pay.

In this case an all white school board in a Tennessee County with 75% black population was required by federal court order to unify its previously unconstitutionally separated black and white school systems. One of its responses was to discharge 22 teachers, 15 of them black and seven of them white. Only one of the white teachers discharged had more than two years service. Most of the 13 black teachers who filed this complaint had periods of service of many years (extending up to 35 years) with this same board.

Prior to the desegregation order, all except one of the discharged teachers had been used at all black schools. It apparently seemed obvious to the District Judge, as it does likewise to us, that appellant board had for many years considered these complainants good enough teachers to teach black students, but in the face of the desegregation order, suddenly determined that they were not good enough to teach white students. The District Judge held that in such circumstances the burden of poor to show nondiscrimination in these discharges fell upon the appellant board and that it had not carried that burden. *Rolfe v. County Board of Education*, 391 F.2d 77 (6th Cir. 1968). We agree.

After these discharges, approximately 40 teachers resigned from the Fayette County school system, and as a result, in the summer of 1970, the Board hired an additional 52 teachers. The overwhelming majority of the teachers hired were white. The Board did not rehire any of those who had been discharged.

In this case both sides agree that *Rolfe v. County Board of Education*, 391 F.2d 77 (6th Cir. 1968), states the controlling rule:

> "The rule is that teachers displaced from a school with a racially homogeneous faculty, because of a decrease in students, must be judged for continued employment by definite objective standards with all other teachers in the system . . .
>
> "Moreover, where a history of racial discrimination is shown to exist, as is the case here, the burden of showing nondiscrimination is on the party having the power to produce the facts. Chambers v. Hendersonville City Board of Education, supra, [364 F.2d 189 (4th Cir. 1966)]." *Rolfe v. County Board of Education*, supra at 80.

In a careful opinion after full hearing, the District Judge found that the school board did not employ definite objective standards in determining who should be discharged. He also held that "a nontenure teacher who has long periods of service with the system acquires a protectible interest in his continued employment and his nonreelection must meet minimal standards of procedural due process," citing *Lucas v. Chapman*, 430 F.2d 945 (5th Cir. 1970), and *Gouge v. Joint School Dist. No. 1*, 310 F. Supp. 984 (W.D. Wis. 1970).

We agree fully with the District Judge's conclusion that the standards employed by the school board were not "definite objective standards" equally applied to all other teachers in the school system. Under the standards employed no comparison at all was made on the basis of years of experience accomplished in black schools to the apparent complete satisfaction of the school board. The standards employed were basically whether or not the teacher had achieved tenure (as that term was newly interpreted) and whether or not there had been complaints.

Many of the complaints relied on for discharge pertained to events of long past years which had obviously not been thought to require disciplinary action at the time.

Further, we approve the District Judge's view that a non-tenure teacher with long years of service has a protectible interest in his employment, certainly against racially motivated discharge. The facts of this case distinguish it from *Orr v. Trinter*, 444 F.2d 128 (6th Cir. 1971), where this court held that a probationary teacher of one year's service did not have a due process right to a hearing and a statement of reasons for nonrehire. In *Orr*, however, the court clearly recognized that race discrimination was a constitutionally impermissible reason for failure to rehire even a one-year probationary employee. *Orr v. Trinter*, supra at 134. *See also Sindermann v. Perry*, 430 F.2d 939 (5th Cir. 1970), *cert. granted*, 403 U.S. 917 (1971); *Johnson v. Branch*, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967). *Cf. Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970).

In our instant case plaintiffs had been employed for terms running up to 35 years and many of them had understood (as did the School Board) that they had tenure. In the year when this dispute arose, a new superintendent discovered that as to teachers of over three years' service who did not have degrees, 12 hours of college work within three years were required for "limited tenure" under state law. No attempt was made to notify the teachers affected of the effect as to them of this new interpretation and no provision at all was made for their being given an opportunity to fulfill the requirement.

This record falls far short of demonstrating equitable handling of the work force reduction problem resulting from the desegregation order.

For the reasons cited and those more fully set forth in the opinion of the District Judge, we agree with the District Judge that appellant School Board did not carry its burden of showing that these discharges were nondiscriminatory.

Another issue in this case is the portion of the District Judge's order requiring the School Board to pay back pay to the teachers found to have been illegally discharged. Appellant Board contends that his order deprived them of the right to a jury trial in relation to a money damage issue. The District Judge and the appellees rely upon *NLRB v. Jones & Laughlin,* 301 U.S. 1 (1937), where the Supreme Court said in part that the Seventh Amendment "has no application to cases where recovery of money damages is an incident to equitable relief."

The same holding has been entered in the context of racial discharge cases by the Fourth and Fifth Circuits in *Smith v. Hampton Training School for Nurses,* 360 F. 2d 577 (4th Cir. 1966), and *Harkless v. Sweeney Independent School District,* 427 F.2d 319 (5th Cir. 1970), *cert. denied,* 400 U.S. 991 (1971).

In this last case (a case like this involving discriminatory discharge of teachers) the Fifth Circuit discussed the Seventh Amendment issue:

> "The last question to be reached is the propriety of the grant of a jury trial. The district court determined that the back pay and the factual issues involved in the prayer for injunctive relief presented jury issues and, therefore, granted defendants' demand for jury trial. The law seems otherwise.
>
> "Section 1983 was designed to provide a comprehensive remedy for the deprivation of federal constitutional and statutory rights. The prayer for back pay is not a claim for damages, but is an integral part of the equitable remedy of injunctive reinstate-

ment. Reinstatement involves a return of the plaintiffs to the positions they held before the alleged unconstitutional failure to renew their contracts. An inextricable part of the restoration to prior status is the payment of back wages properly owing to the plaintiffs, diminished by their earnings, if any, in the interim. Back pay is merely an element of the equitable remedy of reinstatement. See Smith v. Hampton Training School for Nurses, supra. See also NLRB v. Jones & Laughlin Steel Corp., 1937, 301 U.S. 1, 48, 57 S.Ct. 615, 81 L.Ed. 893; Agwilines, Inc. v. NLRB, 5 Cir., 1936, 87 F.2d 146, 151.

"The district court concluded that NLRB v. Jones and Laughlin Steel Corp., supra, and Agwilines, Inc. v. NLRB, supra, were no longer viable in light of the more recent decisions of Beacon Theatres, Inc. v. Westover, 1959, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed. 2d 988; Dairy Queen, Inc. v. Wood, 1962, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed. 2d 44; and Thermo-Stitch, Inc., v. Chemical-Cord Processing Corp., 5 Cir., 1961, 294 F.2d 486, 489. None of these cases involved back pay. Each involved separate equitable and legal claims joined in the same case. The legal claims were for resolution by the jury. The back pay issue here was not a separate legal claim—rather it was a part of the main equitable claim—reinstatement. The same is true as to the underlying factual issues pertaining to the claims to reinstatement.

"This circuit has rejected the view '* * * that the trio of Beacon Theatres, Dairy Queen, and Thermo-Stitch is a catalyst which suddenly converts *any* money request into a money claim triable by jury.' Swofford v. B & W Incorporated, 5 Cir., 1964, 336 F.2d 406, 414. In an action by the Secretary of Labor for an injunction to compel employers to pay employees minimum wages and overtime due them, this

court, after discussing *Beacon Theatres, Dairy Queen,* and *Thermo-Stitch,* stated: 'In the instant case, however, the purpose of the injunction to restrain the withholding of wages due is not to collect a debt owed by an employer to his employee but to correct a continuing offense against the public interest.' Wirtz v. Jones, 5 Cir., 1965, 340 F.2d 901, 904. We then directed the district court to strike the defendants' demand for a jury trial. 340 F.2d at 905.

"In a recent case involving a suit brought because of discrimination in employment, we determined that the employer was not entitled to a jury trial on the issue of back wages, Johnson v. Georgia Highway Express, Inc., 5 Cir., 1969, 417 F.2d 1122. See also Hayes v. Seaboard Coast Line Railroad Company, S.D.Ga., 1969, 46 F.R.D. 49, 52.

"We conclude that these authorities teach that a claim for back pay presented in an equitable action for reinstatement authorized by § 1983 is not for jury consideration nor are the factual issues which form the basis of the claim for reinstatement. The Seventh Amendment does not so require. The plaintiffs' claim should have been determined by the court. The grant of jury trial was error." *Harkless v. Sweeney Indepedent School District, supra* at 323-24.

In teacher discharge cases involving racial discrimination, this court has consistently allowed back pay incident to reinstatements orders. *Hatton v. County Board of Education of Maury County, Tennessee,* 422 F.2d 457 (6th Cir. 1970); *Rolfe v. County Board of Education of Lincoln County, Tennessee,* 391 F.2d 77 (6th Cir. 1968); *Hill v. Franklin County Board of Education,* 390 F.2d 583 (6th Cir. 1968).

In a suit against a labor union for reinstatement and damages, this court discussed and decided the Seventh

Amendment jury trial issue in an opinion by Judge Shackleford Miller:

> "Briefly stated, the rule appears to be as follows. The amendment preserves the right which existed under the common law when the amendment was adopted. Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657, 55 S.Ct. 890, 79 L.Ed. 1636; Welch v. Tennessee Valley Authority, 108 F.2d 95, 98-99, C.A. 6th, Cert. denied, Welch v. United States ex rel. and for Use of T. V. A., 309 U.S. 688, 60 S.Ct. 889, 84 L.Ed. 1030. Thus, it has no application to cases where recovery of money damages is an incident to an action seeking equitable relief, even though damages might have been recovered in an action at law. It does not apply where the proceeding is not in the nature of a suit at common law. The present case is not a suit at common law or in the nature of such a suit. It is a statutory proceeding, unknown to the common law. Guthrie National Bank v. City of Guthrie, 173 U.S. 528, 537, 19 S.Ct. 513, 43 L.Ed. 796. It is essentially an equity proceeding for reinstatement as a member of the Local Union, with the recovery of money damages being merely an incident to such relief. It may be that McCraw has a separate common law action for damages for the injury to his thumb in addition to his alleged cause of action under the statute, in the trial of which he would be entitled to a jury. But no such separate cause of action is alleged by the amended complaint, in which the prayer for relief is based solely upon the alleged violation of the Labor-Management Reporting and Disclosure Act of 1959. In our opinion, McCraw was not entitled to a trial by jury. N. L. R. B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48, 57 S.Ct. 615, 81 L.Ed. 893; United States v. State of Louisiana, 339 U.S. 699, 70 S.Ct. 914, 94 L.Ed. 1216, rehearing de-

nied, 340 U.S. 856, 71 S.Ct. 75, 95 L.Ed. 627; 340 U.S. 907, 71 S.Ct. 276, 95 L.Ed. 656. See: 340 U.S. 899, 71 S.Ct. 275, 95 L.Ed. 651; rehearing denied, 340 U.S. 939, 71 S.Ct. 480, 95 L.Ed. 678; Modification of decree denied, 350 U.S. 812, 76 S.Ct. 43, 100 L.Ed. 728; Welch v. Tennessee Valley Authority, supra, 108 F.2d 95, 98-99, C.A. 6th, cert. denied, Welch v. United States ex rel. and for Use of T. V. A., 309 U.S. 688, 60 S.Ct. 889, 84 L.Ed. 1030; Simmons v. United States, 29 F.Supp. 285, 286-287, W.D.Ky.; Brady v. Trans World Airlines, Inc., 196 F.Supp. 504, 507, D.C.Del.; Conrocode v. Ohio Bell Telephone Co., 11 F.R.D. 303, N.D. Ohio." *McCraw v. United Association of Journeymen & Apprentices of Plumbing, etc.*, 341 F.2d 705, 709-10 (6th Cir. 1965).

It seems obvious to us that the principal issues in this case are equitable and that the back pay issue is truly "an incident to equitable relief." *NLRB v. Jones & Laughlin, supra* at 48. On this ground the Supreme Court decisions relied upon by appellants are distinguishable. *Cf. Dairy Queen v. Wood*, 369 U.S. 470 (1962); *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500 (1959).

The judgment of the District Court is affirmed.

Weick, Circuit Judge, dissenting. In this case the County Board was required by a desegregation order of the District Court to maintain in the School System, as nearly as practicable a ratio of 60% Negro teachers to 40% white teachers. It is not claimed that this ratio was significantly altered at any time.

None of the 22 teachers who were not rehired for the school year 1970-71 had tenure under Tennessee law. T.C.A. 49-1402, et seq. None had a statutory right to re-employment upon the expiration of his contract. *Shannon v. Board of Educ.*, 199 Tenn. 250, 286 S.W.2d 571

(1955). None was recommended to the Board for rehiring by the Superintendent of Schools.

Of the 22 teachers who were not rehired, 15 or 68% were black, and 7 were white. Six of the fifteen blacks who were not rehired were given adverse recommendations by their black principals. Of the seven white teachers who were not rehired, four had been given adverse recommendations by their black principals. During 1969-70 the School Board employed 260 teachers, of whom 156 or 60% were black. 42% of the untenured teachers in the School System were black.

Only thirteen of the black teachers who were not rehired claimed racial discrimination. None of the white teachers, not rehired, made any such claim.

About forty teachers resigned during the summer of 1970, of whom 10% were black. Replacements were hired, 19% of whom were black.

In my opinion, there was no evidence of discrimination and none has been pointed out in the failure of the Board to rehire either black or white teachers.

The Court denied defendants' demand for a jury trial and held that the thirteen plaintiffs were entitled to recover damages in the amount that they would have earned had they been rehired, less what they could reasonably have earned in other suitable employment. The Court made no determination as to the specific amounts of damages, stating that he would determine them in a separate hearing. This part of the case is still pending in the District Court, and the equitable issues are pending here, with the result that we may have piecemeal appeals, which is certainly not contemplated by Rule 54(b), Fed.R.Civ.P.

The Court declined to hear proof offered by defendants as to the competency of the teachers who were not re-

hired. It held that the objective standards required in *Rolfe v. County Bd. of Educ.*, 391 F.2d 77 (6th Cir. 1968), had not been followed, and hence proof of incompetency was not admissible. I respectfully disagree.

In my opinion, the District Court erred in excluding evidence relating to the competency of the teachers, not rehired. The Board of Education, in utilizing tax funds entrusted to it, had a duty to hire or rehire only competent persons to teach in the public school system. *Rolfe* may not be used to justify and order requiring the hiring of a teacher who may not be competent to teach.

In *Rolfe*, unlike the present case, the Board had violated the desegregation plan ordered by the District Court by assigning all Negro teachers to a particular high school and hiring fourteen new teachers, all of whom were white.

In *Rolfe*, no standards had been adopted. In the present case the standards adopted by the Board to be followed in determining whether to offer employment to nontenured teachers, were:

> "1. Teachers who would not be rehired due to the decreased enrollment would be taken from the nontenure teachers employed by the Board.
>
> 2. Teachers would be judged on the following criteria:
>
> (a) Competency. This included formal education of the teacher, knowledge of the subject matter and ability to convey it to the pupils, which included the ability to maintain discipline.
>
> (b) Professional Attitude. This referred to the conduct of the teacher and included the teacher's personal appearance, orderliness and cleanliness maintained in the school room and the teacher's conduct in the community with regard to such

matters as promptness in paying debts and evidences of morality and character.

(c) Recommendations or complaints. This included oral or written complaints from principals, supervisors and the superintendent of the system, with particular reliance upon a complaint by the principal of the teacher involved.

(d) The need for teachers certified in certain fields. This included whether or not the decreased enrollment would cause the Board to have too many teachers in a particular field, such as physical education or science." (pp. 53a-54a)

See also page 346a.

In my opinion, these standards were objective, within the meaning of *Rolfe*. There was substantial evidence that these standards were adhered to by the County Board in determining not to rehire the plaintiffs.

In its decree, the Court ordered that in determining which teachers should be rehired in the event of further faculty or staff reduction, the sole standards to be applied should be: 1) State certification; 2) College work; and 3) Appropriate credits for length of experience.

In my opinion, this was an unwarranted interference with the functions of the County Board and was error. A teacher could have all of these attributes and still be a person unfit for hiring as a teacher.

I also disagree with the holding of the District Court that a "non-tenure teacher who has long periods of service acquires a protectible interest in his continued employment and his non-reelection must need minimal standards of procedural due process." The Court relied on *Lucas v. Chapman*, 430 F.2d 945 (5th Cir. 1970), and *Gouge v. Joint School Dist. No. 1*, 310 F.Supp. 984 (W.D.Wis. 1970).

In my opinion, these decisions are contrary to the weight of authority. It is well settled that no person has a constitutional right to public employment. *Orr v. Trinter,* 444 F.2d 128 (6th Cir. 1971). Such employment is not protected under the due process clause of the Fourteenth Amendment. *Freeman v. Gould Special School Dist.,* 405 F.2d 1153 (8th Cir.), *cert. denied,* 396 U.S. 843 (1969). See also *Jones v. Hopper,* 410 F.2d 1323 (10th Cir. 1969), *cert. denied,* 397 U.S. 991 (1970); *Charland v. Norge Div., Borg-Warner Corp.,* 407 F.2d 1062 (6th Cir.), *cert. denied,* 395 U.S. 927 (1969); *Parker v. Board of Educ.,* 348 F.2d 464 (4th Cir. 1965), *cert. denied,* 382 U.S. 1030 (1966). As to Federal Government employees, see *Cafeteria & Restaurant Workers Union v. McElroy,* 367 U.S. 886 (1961); *Medoff v. Freeman,* 362 F.2d 472 (1st Cir. 1966).

Lastly, the District Court erred in denying to the County Board a jury trial on the legal claim for damage. The majority opinion relies on *NLRB v. Jones & Laughlin,* 301 U.S. 1 (1937), *Smith v. Hampton Training School for Nurses,* 360 F.2d 577 (4th Cir 1966), and *Harkless v. Sweeney Independent School Dist.,* 427 F.2d 319 (5th Cir. 1970), *cert. denied,* 400 U.S. 991 (1971).

Smith and *Harkless* both were based on *NLRB v. Jones & Laughlin.* If *Jones & Laughlin* is inapplicable, then these decisions ought not to be followed.

The Seventh Amendment to the Constitution provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law."

Jones & Laughlin was not a suit at common law, but was a special statutory NLRB proceeding. Hence, Amend-

ment VII had no application to the NLRB proceeding. Although the National Labor Relations Board performs some quasi-judicial functions, it is not an Article III Court, nor any other kind of a Court.

The Supreme Court recognized this difference in *Jones & Laughlin* when it said:

> "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding. Reinstatement of the employee and payment for the time lost are requirements imposed for violation of the statute and are remedies appropriate to its enforcement." (*Id.* at 48, 49.)

The present action, although based on an alleged violation of a statute (§ 1983), is either a suit at common law or is in the nature of such a suit. It was filed in an Article III Court. It sought injunctive relief (reinstatement) and damages.

That legal as well as equitable claims are involved in such a case was held in *Madison v. Wood*, 410 F.2d 564 (6th Cir. 1969), where a Negro policeman filed an action under the Civil Rights Act seeking reinstatement to his position as sergeant and damages for loss of wages. When the statute of limitations was interposed as a defense he amended his complaint to seek only equitable relief. In that case we held:

> "True, a remedy at law solely for damages would not have been adequate to restore Appellant to his former position as police sergeant, but the fact that Appellant amended his complaint to seek purely equitable relief does not transform his claim into a purely equitable one allowing him to escape the bar of the statute of limitations. Dixie Margarine Co. v. Shaefer, 139 F.2d 221 (6th Cir. 1943). Because of the

nature of the alleged wrong done to him, Appellant had a concurrent remedy at law for damages which, because of its inadequacy, entitled him to come into equity for more appropriate relief. Since we hold that Appellant's legal remedy was barred by M.S.A. § 27.605, any equitable relief he may seek must also be barred." (*Id.* at 567, 568)

National Union Elec. Co. v. Wilson, 434 F.2d 986 (6th Cir. 1970) was a cause of action for injunctive relief, for accounting and damages (compensatory and punitive), for conspiracy, and for return of salary payments. It involved unfair competition, and the alleged appropriation of customer lists, trade secrets, and orders. It was held that these averments in the complaint stated actions at law in which the defendants were entitled to trial by jury on the legal claims. We stated:

"In *W. R. Grace v. Hargadine*, 392 F.2d 9 (6th Cir. 1968), legal as well as equitable issues were involved. The trial court submitted the legal issues to a jury, and decided any equitable issues, including any injunctions. This is what the court should have done in the present case." (434 F.2d at 988)

In *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962), it was held:

"Where both legal and equitable issues are presented in a single case, any legal issues for which a trial by jury is timely and properly demanded must be submitted to a jury. *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, pp. 470-473." (Syl (a))

The Court also held that "the legal claims involved in the action must be determined prior to any final court determination of respondents' equitable claims." *Id.* at 479.

In the present case the Court determined the equitable claims first and has not yet heard the legal claims.

In *Ross v. Bernhard*, 396 U.S. 531 at 542 (1970), the Court said:

> "In the instant case we have no doubt that the corporation's claim is, at least in part, a legal one. The relief sought is money damages."

The plaintiffs, instead of filing a separate suit to vindicate their rights, filed only a motion to intervene (setting forth their claims for relief in said motion) in a pending school desegregation case in which a plan for desegregation had already been approved. In my judgment the District Court should have severed the motion and docketed it as a separate action. In a school desegregation case a District Court does not sit as a super Board of Education to supervise the daily operation of the public schools and determine all controversies which may arise in connection with the hiring of teachers. In any event, the use of this device by plaintiffs cannot operate to deprive the defendants of their constitutional right to a jury trial. *Ross v. Bernhard, supra*, fn 15, at 541.

I would reverse the judgment of the District Court.

APPENDIX B

Memorandum Decision

(Filed November 5, 1970)

The issues before the court in these consolidated cases involve the right of former teachers to be reinstated and compensated for damages by the defendant, Fayette County Board of Education. Cause No. 65-136 is a pending pupil and faculty desegregation case in which the court has had numerous hearings pertaining to the plan of desegregation of the Fayette County Board of Education. Certain Negro teachers who were formerly employed in the system intervened in the cause and alleged that they were entitled to reinstatement and damages because of discrimination against them. Cause No. 69-221 is a separate suit filed by Leroy Shaw, Jr., a teacher formerly employed by the Fayette County Board of Education, who seeks reinstatement and damages. Due to the apparent similarity of issues, the cases were consolidated for hearing.

McFERRIN CASE

When the case was called for trial there were twelve individual plaintiffs who were former teachers employed by the defendant Board of Education prior to the 1970-71 school year and who sought reinstatement and damages. It should be noted that an oral motion was made by counsel for the individual plaintiffs at the commencement of the hearing to add, as an additional plaintiff, Mrs. Alberta Rivers. Because the Court did not know what specific proof would be required to determine the issues of the case, the Court reserved its ruling concerning allowing Mrs. Rivers to be added as an additional intervening

plaintiff at the commencement of the hearing. For convenience, in this decision the Court will refer to the intervening former teachers as "the plaintiffs" and the defendants as "Board of Education" or "Superintendent", as the case may be.

All plaintiffs were teachers employed by the Board of Education during the school year 1969-70. Some of the plaintiffs had been employed for many years, such as Mrs. Willie B. Johnson, 35 years, Mrs. Arissie Owens, 30 years, Mrs. Mabel Walker, 28 years, Mrs. Opal Franklin, 23 years and Mrs. Nannie Mae Cole, 20 years. The remaining plaintiffs had been employed at least one and under four years. T.E. 6.

On December 24, 1969, this Court conducted a hearing in the desegregation case which resulted in ordering the defendant to implement a strict zone plan of desegregation for the elementary schools, grades 1 through 8, commencing with the second semester of the 1969-70 school year and a similar requirement for a consolidated high school commencing with the school year 1970-71. This ruling prompted a noticeable reduction of pupils commencing in January 1970. T.E. 4 and 5. It is inescapable that this was due to white pupils transferring to private academies in the county. Based upon the expected enrollment for 1970-71, the Superintendent undertook to determine how many of the existing faculty members would not be needed for the next school year. He estimated that the Board would not need between 20 and 25 faculty members for the 1970-71 school year. Under the policy and the requirement of the state laws pertaining to teachers, the Board annually held a meeting in April to determine which non-tenure teachers would not be rehired so that they could be notified, in accordance with the state law, thirty days before the end of the current school year.

In accordance with the practice and procedure, the Superintendent undertook to prepare recommendations for

the Board's consideration at its April 1970 meeting, to the end that certain teachers would not be rehired, due to the flight of pupils from the system resulting from the Court's desegregation order. The Board met on April 23, 1970, to consider the renewal of contracts for non-tenure teachers. In addition to the Board members, there were present as participants at the meeting, Mr. Bagwell, the Superintendent; Mrs. Dorothy Morton, a supervisor, and Mr. Harris Armour, the attendance teacher, who has additional duties pertaining to record keeping and group insurance within the system. All of the above named, including all members of the Board, were white persons. The defendant Board contends that the determination of the teachers who were not rehired was based upon definite objective standards. The Board contends that its standards were as follows:

1. Teachers who would not be rehired due to the decreased enrollment would be taken from the non-tenure teachers employed by the Board.

2. Teachers would be judged on the following criteria:

(a) Competency. This included formal education of the teacher, knowledge of the subject matter and ability to convey it to the pupils, which included the ability to maintain discipline.

(b) Professional Attitude. This referred to the conduct of the teacher and included the teacher's personal appearance, orderliness and cleanliness maintained in the school room and the teacher's conduct in the community with regard to such matters as promptness in paying debts and evidences of morality and character.

(c) Recommendations or complaints. This included oral or written complaints from principals, supervisors and the superintendent of the system,

with particular reliance upon a complaint by the principal of the teacher involved.

(d) The need for teachers certified in certain fields. This included whether or not the decreased enrollment would cause the Board to have too many teachers in a particular field, such as physical education or science.

The present Superintendent, John E. Bagwell, became superintendent of the defendant system on September 1, 1969. Sometime during the fall of 1969, Mr. Bagwell learned that the defendant system had historically misapplied the tenure law of the State of Tennessee with regard to its teachers. At the time of his discovery of this error, and for many years prior thereto, the system had considered all teachers who had been hired for more than three years to be on tenure. Mr. Bagwell read the law and regulations and determined, if a teacher did not have a degree, it was necessary to acquire not less than twelve quarters hours of college work during a three year period to maintain "limited" tenure. TCA § 49-1406. In preparation for the April 23, 1970 meeting, the Superintendent compiled a list of non-tenure teachers based upon this interpretation of the law. It should be noted that no attempt was made to notify the individual teachers who had been led to believe that they were on tenure. The proof does reflect that the Superintendent made a general announcement of his interpretation at an early April faculty meeting. The list of teachers not on tenure, compiled by the Superintendent, T.E. 6, is alleged to be the entire group compared for the purpose of determining who would not be rehired. Prior to the meeting the Superintendent also notified all principals that each should submit a list of teachers whom he did not wish to have back for the coming year.

Prior to the April 23rd meeting, the Superintendent and Mrs. Morton went over certain personnel files in

preparation for the meeting. The files considered were those about whom complaints had been received. It should be noted that earlier in the school year the Superintendent had asked the supervising principals in the system to prepare rating sheets on their teachers. The record reflects that some rating sheets were made and that they usually had a January 1970 date. The record also reflects that a rating sheet was not made for every teacher and that every principal did not comply with this request. It was the policy of the Superintendent to have the supervisor make an investigation and fill out a rating sheet if a principal gave a teacher at least two poor marks in a respective category. See, for example, T.E. 29 and 30 pertaining to Mrs. Arissie Owens wherein the principal gave her a poor rating in attention to duty and inability to adjust to unusual circumstances, and the supervisor gave her good marks in all categories. The Superintendent testified that he had considered personnel files on all non-tenure teachers prior to compiling his recommendations for the Board. While it is entirely possible that the Superintendent had considered all files over a period of time in order to familiarize himself with his new job as Superintendent, the Court finds that he did not objectively consider each file at the time he was determining which of the 20 to 25 teachers he intended to recommend for not being rehired. He primarily considered the personnel files of those whom he considered to have prior complaints against them. At the Board meeting on April 23, 1970, the Board voted not to rehire 21 teachers and, subsequently, at an adjourned meeting, voted not to rehire one other teacher. Of these 22 teachers, 15 were Negro and 7 were white and all of them, except one, came from schools which had been former Negro schools or new schools which had been intended to be used as all Negro schools prior to the Court's zoning order. Of the 22 persons, 21 of them were based upon the recommendation of the Superintendent, the other being based upon the

recommendation of Mr. Armour, the attendance teacher, who testified that he told the Board that Mrs. Willie B. Johnson, who had been with the system 35 years, was not a dedicated teacher. He based this upon incidents which had occurred nine or ten years before concerning her record keeping while she was an acting principal in a small school, and upon his belief that in 1969 she had knowingly attempted to file a claim for accident insurance when she was not covered by the group policy. He testified he had not disclosed the circumstances of the incidents nine or ten years previously but did explain to the Board the insurance incident. The Court finds that Mrs. Johnson did not knowingly file a false claim. It should be noted that in January 1970 Mrs. Johnson's principal rated her good in seven categories of professional skill and excellent in five categories of personal characteristics.

The Board and the Superintendent considered that it was not necessary to disclose to a non-tenure teacher why he or she was not being rehired and further considered that the remarks, oral and written, from the principals of the schools concerning the teachers were confidential. Therefore, on April 27, 1970, the Superintendent sent a letter to each of the plaintiffs stating that the Board had voted to terminate that teacher's contract. The letter stated that the reason for each teacher being in non-tenure status was that he or she failed to meet the state requirements for maintaining tenure. T.E. 1. The record reflects that not only did the letter fail to disclose the true reasons that the various teachers were not rehired, such as the alleged filing of a false claim, in the case of Mrs. Willie B. Johnson, the private communications between the principals and Superintendent in the case of several teachers, the personal debt problems between the teacher and merchants in the community, in the case of Mrs. Rosa Newbern; but also, the record reflects that in the case of some

of the teachers who made inquiry, the Superintendent either refused to answer the inquiry, as in the case of Mrs. Dixie Pye, T.E. 33, or gave an evasive and untrue explanation of the failure to rehire, as in the case of Mrs. Willie B. Johnson. T.E. 34, 35 and 36. The Superintendent and one Board member testified that the plaintiffs would have been entitled to a hearing if they had asked for it. However, it was the testimony of the Superintendent that it would have done no good in the case of some plaintiffs.

During the summer of 1970, the defendant system had unprecedented resignations of faculty members, which the Court finds was due to the desegregation order resulting in the formation of private academies in the county. To fill the vacancies caused by the resignations, the Superintendent ran ads in the Memphis newspapers for school teachers on June 19, 1970, T.E. 26, and about August 8, 1970. No attempt was made to contact any of the non-tenure teachers who had been notified that they would not be rehired, in spite of the acute shortage of teachers as the current year approached.

The hearing in this Court on the consolidated cases lasted five and one-half days. During the hearing proof was offered on how the alleged definite objective standards were applied by the defendants with regard to each plaintiff. Counsel for the Board indicated that it was his purpose to offer proof substantiating the accusations of the Superintendent with regard to the competency, professional attitude and basis for the principals' private evaluation. This was to be done by principals, other teachers, parents and citizens in the community. On motion of counsel for the plaintiffs, the Court ruled that such proof would not be received because the Court was of the opinion that the proof of the defendant pertaining to the alleged objective standards offered by the defendant did not meet the tests required.

The Court is of the opinion that *Rolfe, et al. v. County Board of Education, Lincoln County, Tennessee, et al.*, 391 F.2d 77 (C.A. 6, 1968) and other similar cases, constitute the controlling authority pertaining to the rights of the plaintiffs in this case. In *Rolfe* the Court said:

> "The rule is that teachers displaced from a school with a racially homogeneous faculty, because of a decrease in students, must be judged for continued employment by definite objective standards with all other teachers in the system."

The opinion later states that the plaintiffs Mrs. Rolfe and Mrs. Peebles were non-tenure teachers and were entitled to have their qualifications compared with all other non-tenure teachers in the system. While the teachers in the instant case were not dismissed from totally segregated faculty assignments, the cause of the cessation of employment was prompted by the Court's desegregation requirements, and, therefore, this Court is of the opinion that the plaintiffs should have been judged by definite objective standards with all other non-tenure teachers within the system. The Court finds that there was not a comparison as contemplated. This is particularly so in the cases in which the Board's reliance was based primarily upon the comments of the principal who was certainly not familiar with all of the non-tenure teachers in the system. The Court further finds that the standards employed by the defendants were not "definite objective standards" contemplated. The variety of the criteria used was not objective but permitted the Superintendent and the Board to apply, in secret, standards susceptible to the Superintendent's and the Board's whim. See *Chambers v. Hendersonville City Bd. of Ed.*, 364 F.2d 189 (C.A. 4, 1966). It should be noted that length of service was not a criteria in the instant case unless all other things were equal. With the wide and vague criteria in most cases not previously announced and the method of comparison, there was little

likelihood that there would ever be a situation where all things were equal and the teachers who had been adequate teachers for automatic renewal of their contracts for 20 to 35 years were not given sufficient consideration for their experience.

This Court, therefore, concludes that in this system objective standards should have been state certification, college work and appropriate credit for length of experience, with the requirement that teachers should be transferred if their qualifications indicate that they are entitled to be retained in preference to others less qualified. When there is a *Rolfe* situation, namely, a loss of teachers due to desegregation, matters pertaining to incidents of lack of discipline, altercations with pupils and parents, non-payment of debts, alleged filing of false claims, instances of improper record keeping and other similar matters should not be considered in the objective comparison. Such matters should be treated as dismissals for cause, the reasons should be given to the teacher, and the teacher should be notified that he, or she, is entitled to a hearing on the accusations against her.

The Court, therefore, concludes with regard to all twelve plaintiffs that definite objective standards were not employed and the plaintiffs are entitled to be reinstated as of the commencement of the school year and are entitled to damages in the amount that they would have earned if they had been permitted to teach, less what they might have earned in some other suitable employment by reasonable diligence. *Rolfe v. County Board of Education, supra,* at page 81.

In addition to the above *Rolfe* reasoning there are other constitutional deprivations with regard to the plaintiffs who had long periods of employment with the Board. A non-tenure teacher who has long periods of service with a system acquires a protectible interest in his continued em-

ployment and his non-re-election must need minimal standards of procedural due process. *Lucas, et al. v. Chapman, et al.*, ... F.2d ... (C.A. 5, decided 8-6-70); *Gouge v. Joint School Dist. No. 1*, 310 F.Supp. 984 (W.D. Wis. 1970)

Because the Court has concluded that the defendants did not make a comparison based upon definite objective standards, it would appear that Mrs. Alberta Rivers was also a victim of the defendants' improper procedure. Furthermore, Mrs. Rivers appears to be in the category of teachers who had a protectible interest in her continued employment. T. E. 6 indicates she had 23 years service in the system.

SHAW CASE

As previously indicated, Leroy Shaw, Jr. filed a separate law suit against the Fayette County Board of Education seeking his reinstatement as a teacher and damages. From the proof there are distinguishable differences in the claim of Leroy Shaw, Jr., who was not re-elected in April 1969, and the claims of the twelve former teachers who intervened in the McFerrin case and who were not re-elected in April 1970. A full evidentiary hearing was had with regard to the issues in the Shaw case.

Leroy Shaw, Jr. contends that he was not re-elected as a teacher in the Fayette County System for the 1969-70 school year because he was a member of the Negro race and, particularly, because he was an unmarried Negro male. He contends that it was the purpose of the defendant school system to systematically eliminate unmarried Negro male teachers in desegregated schools. The defendant Board of Education denies that Leroy Shaw, Jr. was not re-elected as a teacher due to any racial or sex discrimination.

The record reflects that Mr. Shaw obtained a Bachelor of Science degree in 1964, with a major and therefore cer-

tification in Agricultural Education. Commencing at the beginning of the 1966-67 school year, Mr. Shaw became a teacher in the Fayette County System and, pursuant to a temporary certification as an elementary school teacher, he was assigned to the all Negro Braden-Sinai Elementary School. He taught in that school for three years, during which time all of the pupils in the school were Negro and all of the faculty members were Negro. At the Board Meeting of April 22, 1969, Mr. Shaw was not re-elected as a teacher for the coming year. The minutes reflect that he was "teaching out of major field, uncooperative". T. E. 23. By letter dated April 22, 1969, the then Superintendent of the defendant system advised Mr. Shaw that he had not been re-elected for the 1969-70 school year because his major was in Agricultural Education and they were not able to find an opening in his major field. The letter further stated that the Board felt a strong responsibility to try to employ elementary teachers who are fully certified in the area in which they teach. T. E. 38. This letter was sent to Mr. Shaw pursuant to TCA § 49-1306 which pertains to non-tenure teachers and provides that such teachers will continue in service "until they have received written notice from a Board of Education of their dismissal or failure of re-election at least thirty days prior to the close of the school term." Mr. Shaw contacted the then Superintendent, Mr. Carothers, and orally conveyed to Mr. Carothers information concerning his temporary certification as an elementary teacher and, particularly, the fact that he had taken some post graduate work at Memphis State University in 1967. At Mr. Carothers' request, Mr. Shaw obtained written verification of his renewed temporary certificate as an elementary teacher. T. E. 39. By letter of June 16, 1969, Mr. Carothers advised Mr. Shaw that the Board "did not feel that they could consider your request for re-election as a teacher in Fayette County." T. E. 40.

At the time that Mr. Shaw was not re-elected he was completing his third year of teaching in the Fayette County system and, therefore, would have obtained a form of tenure by his re-election to teach for the 1967-70 school year. TCA § 49-1402. Although it is possible that the tenure which he would have received would have been what is known as "limited" tenure, at that time the Fayette County Board of Education was erroneously applying the rules for tenure and considered that a teacher who had taught three years and was re-elected for the fourth year, was a full tenure teacher.

The record reflects that the Superintendent, Mr. Carothers, had a conference with Mr. Ransom Person who had been the principal at Braden-Sinai School during the time Mr. Shaw taught there. The proof is not clear concerning when the conference was held. Mr. Person is of the opinion that it was held after the Board met on April 22, 1969; whereas, Mr. Bagwell, who served as a supervisor at the time, and the then Superintendent, Mr. Carothers, placed the conference prior to the Board meeting. At the time of the conference Mr. Carothers made certain notes which were found in the personnel file of Leroy Shaw. These notes, in Mr. Carother's handwriting, read, in part, "Leroy Shaw—not cooperative—6th and 7th grades—excessive use of paddle—whipped several every day! Did not contribute $3.00 for school picnic, does not listen to suggestions of others including principal." T. E. 52. The Board contends that these notes reflected the true reasons for not re-electing Mr. Shaw at the end of his three year probationary period. Mr. Carothers testified that he did not fully disclose the true reasons, in order to avoid getting the principal, Mr. Person, involved in the reasons for Mr. Shaw's discharge. The proof clearly establishes that Mr. Shaw was a very competent teacher insofar as his classroom performance. This is corroborated by former pupils of his who testified

as witnesses for the defendant and his former principal. Furthermore, the record reflects that Mr. Shaw had received training and worked in the summer Head Start Program where he was considered an excellent faculty member.

There is considerable proof concerning the use of the paddle on students for failure to perform school work. There is no proof to suggest that Mr. Shaw injured any pupil or that the paddling was excessive with regard to force. No complaints were received from parents. The defendant contends that the frequency of padding and the scope, such as paddling the whole class, was proof that Mr. Shaw used paddling excessively. The proof further reflects, both from the principal and Mr. Shaw, that he had used the paddle more in his first year in the system when he had two classes in the same room. In the year before he was not re-elected he had only one class and disciplined the pupils less.

Trial Exhibits 47 and 57 establish that between the 1964-65 school year and the 1970-71 school year the number of white teachers increased from 67 to 101; whereas, the number of Negro teachers decreased from 168 to 147.

At the end of the 1968-69 school year the defendant system retained or hired for the ensuing year 11 unmarried male teachers; two of them were white and were without tenure and nine were Negroes with six of those nine being tenure teachers. Two of those nine were Messrs. Douglas and Hughes who were new to the system and who are intervening plaintiffs in the McFerrin case by virtue of not having been rehired in 1970. T.E. 24 for Identification. (Ans. to Interrogatory No. 9 propounded by Leroy Shaw to County Board of Education.) In the school year 1968-69 38 teachers were terminated, either at the end of the year or during the year. Thirty-five of these teachers were terminated by resignation, retirement, health or other causes which did not reflect unilateral

Board action in termination. Three were terminated by not being re-elected. Two of those who were not re-elected were white and the third was the plaintiff Shaw, the only Negro unmarried male who was terminated that year. T.E. 24 for Identification. (Ans. to Interrogatory No. 10 propounded by Shaw to defendant.) It should be noted that there is an apparent inconsistency between the excerpt of the Board minutes on April 22, 1969, T. E. 23, and the answer to Interrogatory No. 10, referred to. From the minutes it appears that Dorothy Slocum was not recommended for re-election in April 1969, whereas, from the answer to the interrogatory she was terminated from the system in the year 1967-68, due to health. This inconsistency does not appear to be controlling on any of the issues pertaining to the Shaw case.

For the year 1969-70 the system employed as new teachers a total of eight unmarried male teachers, six of whom were white and two of whom were Negro. The two Negroes were Sammy Gordon and Lowden Anderson. They were not re-elected in April 1970, and are intervening plaintiffs in the McFerrin case. Similarly, two of the white teachers newly hired for 1969-70, namely, Virgil Cox and Timothy Howe, were not re-elected in April 1970.

The failure to re-elect Mr. Shaw in April 1969 was not caused by a reduction of faculty members brought about by the desegregation order of this Court. Mr. Shaw was not re-elected in a year when there appears to be no more than the normal termination of faculty members. Therefore, the Court concludes that the principles of *Rolfe v. County Board of Education, Lincoln County, Tenn., supra* were not brought into play. For Mr. Shaw to prevail it must be established that the Board discriminated against him due to his race, or his race and sex; but the Court is of the opinion that the burden of proving that discrimination is upon Mr. Shaw and not the Board of Education as

is the case when *Rolfe* applies. *Cf. Rolfe, supra,* at p. 80; *Chambers v. Hendersonville City Board of Education,* 364 F.2d 189 (C.A. 5, 1966). While it is true that Fayette County Board of Education had not made significant progress in its pupil and faculty desegregation plan by April 1969, at that time there was no court order which would indicate that there would be a need for less teachers due to the desegregation plan. The record in the McFerrin case indicates that the defendant system in 1968 had been ordered to file a revised plan of desegregation in January 1969. This was done and the Board proposed a combination freedom of choice and zone plan. Objections were filed to the revised plan and a hearing was conducted in early April 1969. The Court took the matter under advisement and filed its written opinion on June 10, 1969. Therefore, it was not known by the Board or Superintendent what, if any, decrease in faculty would likely occur in the 1969-70 school year. That opinion directed the defendant system to seek the assistance of the Title IV Center in Knoxville, Tennessee, with regard to its faculty assignment. This was done and a judgment was entered on July 31, 1969, approving the recommendations of the Title IV Center with regard to faculty desegregation in every school.

The Tennessee law pertaining to education is set forth in Title 49 TCA. Chapters 12, 13 and 14 pertain to the certification of teachers, rights and duties of non-tenure teachers and teachers' tenure, respectively. Non-tenure teachers must serve a probationary period of three years before being eligible for tenure status. TCA § 49-1306. As previously indicated, this law requires that teachers be notified thirty days prior to the end of the school term if they are being dismissed or not being re-elected. Tennessee law recognizes a difference between dismissal or discharge and failure to re-elect. *Shannon v. Board of Education, Kingsport,* 199 Tenn. 250 (1955); *Johnson v. City*

of Jackson, 42 Tenn. App. 296, 305 (1956). If a tenure or non-tenure teacher is dismissed, it is contemplated that there will be notice of the reasons for the dismissal and an opportunity for a hearing if desired. TCA. § 49-1414, et seq. and TCA. § 49-214. On the other hand, a teacher who is not re-employed, as opposed to dismissed, prior to the completion of his probationary period is not entitled to notice and a judicial review of the reasons for not re-employing him. Of course, the application of this law is subject to the Fourteenth Amendment to the United States Constitution, and discrimination on the basis of race may not be applied in the failure to re-elect or to discharge.

This Court is of the opinion that the facts do not establish that Mr. Leroy Shaw, Jr., was not re-elected due to his race, or his race or sex, and, therefore, the Court concludes that he should not be reinstated and awarded damages and attorney's fees.

The plaintiff also relies on his procedural due process rights in that he was not given notice of the reasons for his discharge and the opportunity for a hearing. Plaintiff Leroy Shaw, Jr., has not established under the facts a protectible interest by virtue of his long continuing service, as was the case in *Lucas v. Chapman*, ... F.2d ... (C.A. 5, decided 8-6-70), wherein plaintiff was a non-tenure teacher whose contract had been renewed for 11 years and, similarly, *Gouge v. School Dist. No. 1*, 310 F. Supp. 984 (W. D. Wis. 1970), wherein one teacher had served for five years on a series of one year contracts and the other teacher had served for eighteen years on a series of one year contracts.

This Court, therefore, concludes that it should not serve as a reviewing authority of the decisions of Boards of Education in the matter of not re-electing non-tenure teachers during or at the end of their three year proba-

tionary period, in the absence of a showing of discrimination against the teacher who was not re-elected. As previously indicated, the proof does not establish such discrimination in this case.

This .... day of November, 1970.

/s/ Robert M. McRae
U. S. District Judge

APPENDIX C

Decree

(Filed December 16, 1970)

The above consolidated cases came on for hearing on the 21st, 22nd, 23rd, 26th, 27th, and 28th days of October, 1970, before the Honorable Robert M. McRae, United States District Judge, without intervention of a jury, upon the entire records in both cases, including all affidavits, pleadings, motions and exhibits filed or in evidence and including an oral motion in behalf of the plaintiff, Leroy Shaw, Jr., for leave to file an amendment to his complaint, which motion was granted and an oral motion in behalf of Mrs. Alberta Rivers to be joined as one of the additional intervening plaintiffs, which was taken under advisement by the Court, and after hearing all of the evidence and argument of counsel, the Court does find and hold that the intervening plaintiffs, including the movant, Mrs. Alberta Rivers, are entitled to relief but that the plaintiff, Leroy Shaw, Jr., in the Shaw case is not entitled to relief, all to the extent and for the reasons set forth in the Memorandum Decision of the Court filed 5 November 1970 which said Decision is incorporated herein by reference as a part of this Decree and is adopted as the findings of fact and conclusions of law of the Court.

It Is Therefore Ordered, Adjudged, Decreed and Enjoined as follows:

1. It appearing to the Court that the movant, Mrs. Alberta Rivers, has now filed with the Court a formal motion to be added as an additional plaintiff in the case which the Court will treat as a continuation of the oral motion made in her behalf at the commencement of the trial, said motion is granted and Mrs. Alberta Rivers will be and is treated as an additional intervening plaintiff in the case nunc pro tunc as of the commencement of the action on

the motion for further relief and to allow additional plaintiffs to intervene and join additional defendants.

2. Mrs. Mary E. McKelvey is dismissed as an additional intervening plaintiff on statement of her counsel in open Court that she has moved to East Tennessee since the filing of the motion for further relief and no longer desires to be a party.

3. The defendants, County Board of Education of Fayette County, Tennessee, its board members and John E. Bagwell, Superintendent of Schools of Fayette County, Tennessee, will reinstate the intervening plaintiffs, Mrs. Mable C. Walker, Mrs. Arissie Hardy Owens, Mrs. Rosa J. Newbern, Mrs. Dixie Jordan Pye, Mrs. Nannie Mae Cole, Myles Wilson, Lowden E. Anderson, Jr., Cornelius W. Douglas, Jr., Sammy Gordon, Earnest Hughes, Mrs. Opal L. Franklin, Mrs. Willie B. Johnson, and Mrs. Alberta Rivers and re-assign them forthwith on a non-discriminatory basis as teachers in the Fayette County School System as of the commencement of the School Year 1970-71 in the same or comparable positions to those which they held at the time of their dismissals, without demotion, loss of pay or other prejudice. The aforesaid intervening plaintiffs are entitled to damages in the amount that they would have earned had they been permitted to teach, less what they might have earned in some other suitable employment by reasonable diligence. If the parties cannot agree upon said amounts, the amounts will be specifically determined at a separate hearing in this cause, to be held at a time to be set by the Court after the intervening plaintiffs are reinstated.

4. Defendants' application for jury trial on the issue of damages is denied.

5. In the event of any further reduction of faculty or professional staff arising from or in connection with desegregation in Fayette County Public Schools, all teachers will be judged for continued employment by definite ob-

jective standards with all other teachers in the System, which objective standards shall be limited to: state certification, college work and appropriate credit for length of experience, with the requirement that teachers shall be transferred if their qualifications indicate that they are entitled to be retained in preference to others less qualified.

6. The amendment to the complaint in the Shaw case, allowed to be filed raising issues of alleged violation of his substantive and procedural due process rights under the Fourteenth Amendment, will be treated as relating back to the beginning of the hearing with defendants having denied same, and the Court's said Memorandum Decision is deemed to cover said amendment filed as a continuation of the oral statement of the substance of same as made by counsel for plaintiffs in open court at the commencement of the hearing.

7. The claim of the plaintiff, Leroy Shaw, Jr., under his complaint as thus amended, for reinstatement as a teacher, back pay and attorney fees, is denied.

8. The foregoing is deemed and treated as a final decision upon said issues raised by the pleadings as to dismissal of the plaintiff teachers and their rights to reinstatement and back pay.

9. The prayer for attorney's fees for Avon N. Williams, Jr., Esq., is hereby served and will be determined after responsive affidavits or proof from the defendants is filed.

10. All issues pertaining to the effort to add additional defendants and secure relief against private academies in the McFerren case are reserved.

This 16th day of December 1970.

.....

United States District Judge

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FILED
MAY 27 1972

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1392

COUNTY BOARD OF EDUCATION OF
FAYETTE COUNTY, TENNESSEE,

Petitioner,

—VS.—

MRS. MABLE C. WALKER, *et al.*

BRIEF IN OPPOSITION TO CERTIORARI

AVON N. WILLIAMS, JR.
1414 Parkway Towers
404 James Robertson Parkway
Nashville, Tennessee 37219

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
SYLVIA DREW
10 Columbus Circle
New York, New York 10019

Attorneys for Respondents

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

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COUNTY BOARD OF EDUCATION OF FAYETTE COUNTY, TENNESSEE,

Petitioner,

—VS.—

MRS. MABLE C. WALKER, *et al.*

BRIEF IN OPPOSITION TO CERTIORARI

Opinions Below

Since the filing of the Petition for a Writ of Certiorari, the opinion of the United States Court of Appeals for the Sixth Circuit and the dissenting opinion of Judge Weick have been reported at 455 F.2d 199, 204.

Statement

Respondents herein are black teachers formerly employed by the County Board of Education of Fayette County, Tennessee, who intervened in a lawsuit to desegregate the county's public schools after the Board failed to rehire them following implementation of a desegregation plan ordered by a United States District Court. Seven of the thirteen respondents had taught in the county public

schools for periods between 18 and 35 years, prior to 1970, and had been treated by the Fayette County school authorities as having "tenure."[1] Each respondent was not rehired for the 1970-71 school year following the Superintendent's recommendation and action thereon by the school board (App. 123a, 388a), which had never itself adopted any criteria to be applied in case of the sort of system-wide faculty reduction occasioned after the desegregation plan was implemented (App. 113a, 350a).

The Board sets out (Petition, pp. 4-5) the "factors" that it claims were considered in determining which faculty members would be terminated.[2] However, the evidence

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[1] Tennessee law provides that public school teachers who have college degrees attain full tenure status upon being offered a contract by a school system for a fourth consecutive year. Teachers without degrees who have worked four years are afforded "limited tenure" so long as they have taken twelve credits toward a degree within the preceding three years (App. 119a [citations to appendix in 6th Cir. No. 71-1206 are given in this form throughout this Brief]). Prior to 1969, the Fayette County school system had misapplied the state teacher tenure law by considering all teachers who had been offered contracts for four years or more to be tenured (App. 207a-08a, 327a, 349a). For this reason, those respondents who had served as teachers in the Fayette County public school system for over a decade (App. 204a-60a) were under the impression, prior to their termination, that they had tenure (App. 314a). They had never been notified by the Superintendent of Schools that they were actually not tenured nor that they could become tenured by complying with the educational requirements of the law (App. 350a). See Appendix to Petition [Ptn. App.] A-20; A-14, 455 F.2d at 201.

[2] The 1969 district court order directing implementation of a desegregation plan had also required assignment of faculty members to each school on a basis substantially in accord with the system-wide black-to-white faculty ratio. See *United States* v. *Montgomery County Bd. of Educ.*, 395 U.S. 225 (1969); *Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F.2d 1211 (5th Cir. 1969), *rev'd in part on other grounds sub nom. Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 290 (1970); *Nesbit* v. *Statesville City Bd. of Educ.*, 318 F.2d 1040 (4th Cir. 1969); *Swann* v.

revealed, and the district court found, that no objective comparison of these or any other characteristics among Fayette County teachers was ever made:

> [T]he plaintiffs should have been judged by definite objective standards with all other non-tenure teachers within the system. The Court finds that there was not a comparison as contemplated. This is particularly so in the cases in which the Board's reliance was based primarily upon the comments of the principal who was certainly not familiar with all of the non-tenure teachers in the system. (Ptn. App. A-24).

The Superintendent did not consider all non-tenure teachers in arriving at his recommendations for dismissal but only those about whom, some time in the past, some kind of complaint had been made (whether or not that complaint was considered serious enough to warrant dismissal at the time it was lodged), and those he considered "poor teachers" (App. 177a-178a).

Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 19-20 (1971). Prior to the start of desegregation, 60% of all Fayette County teachers were black; in selecting those to be dismissed because of the overall reduction in force, the Superintendent and board regarded this ratio as immutable and sought to maintain it by insuring that at least 60% of the terminated teachers were black (App. 124a, 219a, 515a). *Compare Carter* v. *West Feliciana Parish School Bd.*, 432 F.2d 875, 879 (5th Cir. 1970). Because only 42% of the non-tenure teachers in the county were black, this initial selection criterion burdened black teachers far more harshly than whites. Of course, it is impossible to know whether black teachers or white teachers were ultimately favored in the selection of those to be terminated since, as the District Court and the Court of Appeals found, no process of objective comparison was ever undertaken and one cannot contrast the teachers actually terminated with those who should, on the basis of their merit, have been released. In any event, it seems likely that, but for this misconstruction of the court's decree, all of the terminated teachers would have been black.

Even this limited sample was not evaluated in a systematic and objective manner. For one thing, the Superintendent did not have before him the same kinds of information about all of the teachers. Rating sheets requested by him in September, 1969 (App. 148a) had not been prepared for all teachers (App. 234a). He made no attempt to assess the reports or past complaints he had from various principals in light of the principals' differing qualifications (App. 179a) nor to investigate the substance or significance of the complaints, nor to permit the teachers to explain or rebut such complaints; thus, he characterized the reasons for dismissal of some of the respondents as "not very substantial" in his trial testimony (App. 211a).

Finally, when the Superintendent made his selection, he was unable to recall how each non-tenure teacher had been rated by his principal or supervisor (App. 183a); and personnel files or rating sheets were not brought before the school board (App. 152a). The district court concluded:

> The Court further finds that the standards employed by the defendants were not "definite objective standards" contemplated. The variety of the criteria used was not objective but permitted the Superintendent and the Board to apply, in secret, standards susceptible to the Superintendent's and the Board's whim. (Ptn. App. A-24)[3]

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[3] As the District Court stated from the bench:

> [I]t is very apparent that the whole system of choosing who was not to be rehired or dismissed centered on this man's [Superintendent Bagwell's] mind or state of mind. He was the whole objective standard, according to the defendants. (App. 265a-266a).

The evidence further established that after Respondents' employment had been terminated but prior to the beginning of the 1970-71 school year, unexpected resignations created vacancies for teachers in Fayette County, many in the various fields of Respondents' state certification (A. 142a, 211a, 217a). Yet the Board made no effort to reemploy Respondents, whose service (up until the process of desegregation resulted in an overall faculty reduction) had been sufficiently satisfactory to result in contract renewal; instead, teachers new to the school system were sought and hired (A. 142a).

Following presentation of evidence by the Board with respect to the actual selection process and the information available to the Board and Superintendent at that time—and cross-examination of the Superintendent and other Board employees on behalf of Respondents—the District Court ruled that it would accept further evidence on that issue alone but would not permit the introduction of testimony about Respondents' qualifications which had not been available to the Superintendent or the Board at the time the decision to terminate Respondents' employment was made.

The Board maintained unsucessfully in the District Court and the Court of Appeals that its selection process had been impartial. The District Court ruled against these contentions—but not, as the Board suggests (Ptn., p. 6), because competency and teaching ability are impermissible criteria of selection. Rather, the Court found that the Board had *not* objectively compared its entire faculty on the basis of such criteria, both because comparisons were made only among a selective sample and because the method of comparison depended upon the unchecked discretion of the Superintendent.

The District Court also held, with respect to those of the Respondents who had long periods of service and whose terminations were sought to be justified by the Superintendent on the basis of incidents or complaints which had come to his attention in prior years, that the due process clause of the Fourteenth Amendment prohibited their discharge without any opportunity to explain or rebut such charges and complaints. Finally, in order to prevent a recurrence of the events which led to this lawsuit, the District Court ordered future faculty reductions occasioned by desegregation to be governed by comparison of state certification, degrees and college work, and experience alone; other dismissals based on specific incidents or complaints unrelated to these criteria, the court held, would have to be processed in accordance with Tennessee law:

> Such matters should be treated as dismissals for cause, the reasons should be given to the teacher, and the teacher should be notified that he, or she, is entitled to a hearing on the accusations against her. (Ptn. App. A-25).

The Court of Appeals affirmed, Judge Weick dissenting. The majority agreed with the District Court's finding that Respondents had been discharged in a racially discriminatory manner, and not on the basis of an adequate or fair comparison of their abilities and qualifications with other teachers'. The majority of the Court of Appeals also held, without mentioning the due process clause, that Respondents were constitutionally protected against racially discriminatory discharge from their employment; and finally, the majority below agreed with the District Court that the Seventh Amendment did not guarantee the Board a jury trial in this action for redress of constitutional rights pursuant to 42 U.S.C. §1983.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The Decision Below Does Not Rest Upon Any Notion Of Procedural Due Process Rights Guaranteed Public Schoolteachers But Upon Findings Of Racial Discrimination.

The Board miscasts the holding of the Court of Appeals when it suggests that this Court should review this case to consider whether or not the due process clause of the Fourteenth Amendment guarantees public school teachers notice of charges and a hearing before a school board may decide not to rehire them.

Contrary to the assertions of the Petition, the Respondents were ordered reinstated because the Court of Appeals agreed with the District Court that the termination of their employment was racially discriminatory; indeed, the law is settled in the Sixth Circuit that schoolteachers have no general due process rights, as the majority of the court below recognized.[4]

Thus there is no conflict among circuits on the issues actually decided below,[5] nor will this case be affected by

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[4] "The facts of this case distinguish it from *Orr* v. *Trinter*, 444 F.2d 128 (6th Cir. 1971), where this court held that a probationary teacher of one year's service did not have a due process right to a hearing and a statement of reasons for nonrehire. In *Orr*, however, the court clearly recognized that race discrimination was a constitutionally impermissible reason for failure to rehire even a one-year probationary employee. *Orr* v. *Trinter*, supra at 134." (455 F.2d at 201, Ptn. App. A-4).

[5] *Orr* v. *Trinter*, *supra* n.4, does conflict with decisions of the First, Fifth and Seventh Circuits, and a petition for certiorari to review *Orr* is presently pending in this Court, No. 71-819.

the determination of cases already before this Court to which reference was made in the Petition.[6] This case is therefore an entirely inappropriate vehicle for the inquiry suggested by the Board in its Petition.

II.

The Courts Below Concluded That Respondents Had Been Discharged As A Result Of Racial Discrimination By Applying Well Settled Legal Principles To The Facts.

Again contrary to the assertions of the Petition, the Court of Appeals did not forbid school boards from considering the competence or teaching ability of its faculty in determining whether or not to rehire individual teachers; instead, the court applied to the facts of this case, settled law developed by the federal courts since *Brown* v. *Board of Educ.*, 349 U.S. 294 (1955) for the purpose of insuring that reductions in force brought about by desegregation are not carried out in a racially discriminatory fashion.

Consistent with the policy announced in *Brown* of relying upon the lower federal judiciary to elucidate and remedy the many difficult problems associated with the process of school desegregation, see *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 6, 14 (1971), a consistent body of legal principles has been developed and applied to situations of faculty reduction occasioned by desegregation.[7] The general rule is that where the teaching staff

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[6] *Perry* v. *Sindermann*, No. 70-36, *cert. granted*, 403 U.S. 917 (1971), decision below, 430 F.2d 939 (5th Cir. 1970); *State College Bd. of Regents* v. *Roth*, No. 71-162, *cert. granted*, 404 U.S. 909 (1971), decision below, 446 F.2d 806 (7th Cir. 1971).

[7] *E.g.*, *Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F.2d 1211 (5th Cir. 1969), *cert. denied*, 396 U.S. 1032 (1970), *rev'd in part on other grounds sub nom. Carter* v. *West Feliciana Parish School Bd.*, 396 U.S. 290 (1970); *North Carolina Teachers Ass'n* v.

must be reduced because of operating economies or other factors connected with desegregation, those to be discharged must be selected by comparing all teachers according to definite and objective criteria. See *Rolfe* v. *County Bd. of Educ.*, 391 F.2d 77 (6th Cir. 1968). A corollary principle is that the process of comparison must examine the performance of all teachers in each category as to which the performance of any is considered. Thus, for example, reports of tardiness are insufficient justification for selecting a particular teacher to be discharged during a reduction in force where the punctuality and attendance records of all teachers are not compared.

It is for this reason that past pecadilloes or inadequacies, which were never before viewed as warranting termination, may not, standing alone, justify termination of black teachers in connection with desegregation-related reductions in force. Other Courts of Appeals have also specifically applied this principle. *E.g., Jackson* v. *Wheatley School Dist. No. 28, supra,* 430 F.2d at 1363;[8] *Sparks* v. *Griffin,* No. 71-2747 (5th Cir., May 16, 1972) (slip op. at p. 19).[9]

Asheboro City Bd. of Educ., 393 F.2d 736 (4th Cir. 1968); *Jackson* v. *Wheatley School Dist. No. 28*, 430 F.2d 1359 (8th Cir. 1970); *Hatton* v. *County Bd. of Educ.*, 422 F.2d 457 (6th Cir. 1970).

[8] "Defendants offered some vague and inconclusive evidence to the effect that the school officials had over the years received some complaints . . . Each of these plaintiffs had valid certificates to teach and served in such capacity in [the black school] for eleven years. It would appear that if the complaints were not such as to require action against the plaintiffs while they were serving in the Negro school, the complaints would not constitute a valid basis for refusal of employment in the integrated school. Moreover, plaintiffs were not advised that [the complaints] were a factor in their release and they were given no opportunity to meet such charge."

[9] ". . . We reject as clearly erroneous the district court's findings that the district's board voted not to renew the contracts of the plaintiffs-appellants for the 1968-1969 academic year on the basis of non-racial, objective, and reasonable criteria. It is undisputed

Likewise, courts have limited to designated criteria, the factors which school boards may in the future consider whenever reductions in force are necessitated by desegregation. *E.g., Smith* v. *Concorida Parish School Bd.*, 445 F.2d 285 (5th Cir. 1971); *United States* v. *Texas Education Agency*, No. 71-3135 (5th Cir., May 10, 1972). And all of the Courts of Appeals which have considered the issue have agreed that faculty members displaced by a reduction in force may not be relegated to the status of new applicants, but must be afforded preference in filling subsequent vacancies. *E.g., Rolfe* v. *County Bd. of Educ.*, 391 F.2d 77, 80-81 (6th Cir. 1968); *North Carolina Teachers Ass'n* v. *Asheboro City Bd. of Educ.*, 393 F.2d 736, 744 (4th Cir. 1968); *Clark* v. *Board of Educ. of Little Rock*, 369 F.2d 736, 744 (8th Cir. 1966); *Singleton* v. *Jackson Municipal Separate School Dist.*, 419 F.2d 1211, 1218 (5th Cir. 1969). The Board's failure to afford Respondents such a preference justifies the District Court's order without regard to the lower court's finding as to the lack of impartiality in the selection process.

In sum, all of the matters about which the Board complains in its Petition are governed by principles of law well settled in all the Courts of Appeals,[10] and review is not warranted herein.

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that the administration of the Union Hill Independent School District tolerated the alleged shortcomings in the performances of the plaintiffs-appellants for extended periods of time but drew the line only when true desegregation of the district was about to become a reality."

[10] The dissent of Judge Weick below is grounded upon a misconstruction of the District Court's order identical to the Board's; the lower court's ruling does not require "the hiring of a teacher who may not be competent to teach" (Ptn. App. A-11) but only that incompetence be established as provided under Tennessee law rather than being presumed and veiled behind federal court desegregation decrees. See Ptn. App. A-25.

III.

The Rulings Below That The School Board Was Not Entitled To Demand A Jury Trial Are Plainly Right And Do Not Conflict With Applicable Decisions Of This Court.

The Board claims a Seventh Amendment right to demand a jury trial in this action brought pursuant to 42 U.S.C. §1983 to redress constitutional deprivations, and also that the ruling below conflicts with *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469 (1962). The short answer to these contentions is that the right of jury trial exists only as to causes of action in which it was available at the time the Amendment was adopted. Where, as here, the litigation is brought pursuant to express statutory authorization, and was unknown at common law, there is no constitutional right to a jury. *United States* v. *Louisiana*, 339 U.S. 699, 706 (1950); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

The issue was last presented to this Court in a petition for review from the decision in *Harkless* v. *Sweeny Independent School Dist.*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971). There, the Court of Appeals for the Fifth Circuit, in a teacher discharge case like this one, expressly held there was no right to jury trial, and reaffirmed its view, earlier expressed, that *NLRB* v. *Jones & Laughlin Steel Corp., supra*, was unaffected by the *Beacon Theatres, Inc.* v. *Westover*, 359 U.S. 500 (1959) and *Dairy Queen* cases relied upon by this School Board. The court noted that the Fifth Circuit had "rejected the view '. . . that the trio of Beacon Theatres, Dairy Queen, and Thermo-Stitch is a catalyst which suddenly converts *any* money request into a money claim triable by a jury.' *Swofford* v. *B&W, Inc.*, 5 Cir., 1964, 336 F.2d 406, 414." *Harkless* v. *Sweeny Inde-*

pendent School Dist., supra, 427 F.2d at 324. The Fourth Circuit reached a similar result in an action involving the reinstatement of nurses who had been the victims of racial discrimination. *Smith* v. *Hampton Training School,* 360 F.2d 577, 581 (4th Cir. 1966).

Each of these cases characterized the back pay-money demand as "incidental" to the subject matter of the claim—the vindication, pursuant to 42 U.S.C. §1983, of constitutional rights.[11] This is quite different, however, from the sense in which litigants have sought to characterize independent legal and equitable claims, joined together in a single lawsuit, as "incidental" to one another in order to promote or defeat the right to jury trial. *Beacon Theatres, Dairy Queen,* and other decisions of this Court make absolutely clear that where the subject matter of a lawsuit includes a legal claim cognizable to be tried before a jury when the Seventh Amendment was adopted, the right to jury trial is absolute.

On the other hand, the rationale of *NLRB* v. *Jones & Laughlin Steel Corp., supra*: that there is no jury trial right applicable to statutorily created actions, is not affected by the *Beacon Theatres* cases and has been applied by this Court and the lower federal courts. *E.g., Porter* v. *Warner Co.,* 328 U.S. 395 (1946) (Emergency Price Control Act of 1942); *Mitchell* v. *DeMario Jewelry,* 361 U.S. 288 (1960) (Fair Labor Standards Act); *Brady* v. *Trans*

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[11] One of the latest jury trial right cases from this Court, *Ross* v. *Bernhard,* 396 U.S. 531 (1970), indicates that the availability of a jury depends upon the nature of the underlying claim. There, plaintiffs in a stockholder's derivative action were allowed to demand a jury trial not simply because "[t]he relief sought is money damages" but because there were "allegations [in the complaint] of ordinary breach of contract and gross negligence," traditional legal claims entitling the parties to a jury trial. 396 U.S. at 542.

World Airlines, Inc., 196 F. Supp. 504 (D. Del. 1961) (Railway Labor Act); *Conrocode* v. *Ohio Bell Tel. Co.*, 11 F.R.D. 303 (N.D. Ohio 1951) (Selective Training and Service Act); *McGraw* v. *United Ass'n of Journeymen, etc.*, 341 F.2d 705 (6th Cir. 1965) (Landrum-Griffin Act); *King* v. *Laborers Int'l Union*, 443 F.2d 273 (6th Cir. 1971) (*dictum*), and cases cited therein (Title VII, Civil Rights Act of 1964).

Finally, we suggest that in any event, the issue is not significant enough to warrant review by this Court. In 1972, the Congress amended Title VII of the Civil Rights Act of 1964 (dealing with discrimination in employment) so as to include within the Act's coverage, for the first time, employees of state and local governmental bodies—including teachers. 1972 U.S. Code Cong. & Adm. News 814. Since most future claims of discriminatory teacher discharge will probably be brought under Title VII, as to which it has been consistently held that there is no jury trial right, *e.g.*, *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *King* v. *Laborers Int'l Union*, *supra*, this issue is likely to become academic.

CONCLUSION

For the foregoing reasons, Respondents respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

AVON N. WILLIAMS, JR.
1414 Parkway Towers
404 James Robertson Parkway
Nashville, Tennessee 37219

JACK GREENBERG
JAMES M. NABRIT, III
NORMAN J. CHACHKIN
SYLVIA DREW
10 Columbus Circle
New York, New York 10019

Attorneys for Respondents